first place, it is to be noted that to have inserted such words as "knowingly" or "without lawful excuse" in the relevant part of section 6(3) of the Act would in any case not have been sensible. Further, in all the various instances where the word or phrase is used in the other sections of the Ordinance before-mentioned the use is with reference to the doing of some specific act or the failure to do some specific act as distinct from the mere passive continuance of behaviour theretofore perfectly lawful. Finally, Their Lordships are mindful that in the *Sherras* case itself the fact that the word "knowingly" was not found in the sub-section under consideration by the court but was found in another sub-section of the same section was not there regarded as sufficient to displace the ordinary rule.

Their Lordships have accordingly reached the clear conclusion, with all respect to the view taken in the courts below, that the application of the rule that *mens rea* is an essential ingredient in every offence has not in the present case been ousted by the terms or subject-matter of the Ordinance and that the appellant's conviction and sentence cannot stand.

Their Lordships will accordingly humbly advise Her Majesty that this appeal ought to be allowed and the conviction of the appellant and the sentence imposed upon him ought to be quashed. Their Lordships also are of opinion that the respondent ought to pay the costs of the appellant's appeal to the Board.

Appeal allowed.

Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

ANGLO ORIENTAL PLANTATIONS LTD. v. RAJAMMAH

[A.C.J. (Gill J.) December 18, 1962]

[K.L. — Civil Appeal No. 9 of 1962]

Workmen's compensation — Personal injury — Diminution of earning power — Continuing incapacity — Injury to the eye — Meaning of "Loss of sight" — Workmen's Compensation Ordinance, 1952.

Damages — Eye — Injury to — Continuing incapacity — Meaning of "loss of sight" — Workmen's Compensation Ordinance, 1952, First Schedule.

On November 13, 1960, whilst the respondent was tapping rubber, a bark shaving struck her right eye as a result of which she suffered partial permanent disability in the form of partial loss of vision amounting to 10% loss of unimpaired physical capacity. On being discharged from hospital, the respondent resumed work with the appellants and continued to earn as much as she was earning before the accident. On an application to the President, Sessions Court, as arbitrator under section 30 of the Workmen's Compensation Ordinance, the learned President found that her earning capacity had been reduced by 10% on the ground that if the respondent lost her present employment her opportunities for obtaining alternative employment as a tapper or other manual jobs would be narrowed to the extent proportionate to her loss of unimpaired physical capacity. The appellants appealed on a certificate under section 39 of the Workmen's Compensation Ordinance, 1952.

Held: (1) in respect of any injury lesser than an injury resulting in blindness, the workman must prove that it resulted in reduction of his earning capacity in every employment which he was able to undertake at the time of the accident;

(2) the respondent has failed to show that her earning capacity in every employment which she was able to undertake at the time of the accident had been reduced.

Cases referred to:—

(1) *Cardiff Corporation* v. *Hall* [1911] 1 K.B. 1009, 1026.

(2) *Allen* v. *Tinsley Park Collieries Ltd.* (1944) 37 B.W.C.C. 28, 31.

(3) *Hawkins* v. *Powells Tillary Steam Coal Co. Ltd.* [1911] 1 K.B. 988, 996.

CIVIL APPEAL.

M. Shanker for the appellant.

Respondent in person.

Gill J.: This is an appeal from an award dated the 23rd May, 1962 by the President, Sessions Court, Klang, sitting as Arbitrator under the Workmen's Compensation Ordinance, 1952, whereby an order was made for the payment to the respondent of a lump sum of $506.59 for an injury to her right eye arising out of and in the course of her employment with the appellants and resulting in a partial disablement of a permanent nature.

A brief history of the proceedings leading up to the reference of the matter to the Arbitrator is as follows. The respondent was employed as a rubber tapper on Golconda Estate, Kapar. On 13th November, 1960, whilst she was tapping, a bark shaving struck her right eye as a result of which she was admitted to the Kapar Group Hospital as an in-patient and then transferred to the General Hospital, Kuala Lumpur. On being discharged from the Kuala Lumpur Hospital after about ten to fifteen days she resumed work as a tapper on or about the 24th December, 1960, from which date she continued to receive her wages based on a daily wage plus an output factor. She lost some of her vision in her right eye but admittedly her efficiency as a tapper had not decreased and her earnings after the accident were the same as prior to the accident. According to a certificate issued by the Ophthalmologist, General Hospital, Kuala Lumpur, on 21st December, 1960, the respondent suffered a scar on the cornea of her right eye with defect of vision and she sustained the following degree of disablement as a result of the accident:

(i) Total temporary disablement estimated to last from date of injury to 22nd December, 1960.

(ii) Partial permanent disablement resulting in partial loss of vision amounting to 10% loss of unimpaired physical capacity.

The appellants by their letter dated 17th November, 1960, reported the accident to the Assistant Commissioner for Labour, Port Swettenham, who, on 16th January, 1961, wrote to the appellants to say that the injured workwoman had sustained permanent partial disablement and that she was entitled to a compensation of $84 for temporary disablement and $506.59 for permanent disablement.

On 16th March, 1961, the appellants wrote to the Commissioner disputing liability as regards compensation for permanent disablement. It would appear that the amount assessed as compensation for temporary disablement has been paid. On 27th March, 1961, the respondent made an application for compensation, as a result of which an enquiry was held by the Assistant Commissioner for Labour, Port Swettenham, on 27th July, 1961. At this enquiry it was agreed between the parties:—

(a) That the applicant/injured is a workman within the meaning of the Workmen's Compensation Ordinance No. 85 of 1952.

(b) The average monthly earnings for temporary disability is $97.69 and for permanent disability is $105.54.

(c) That the compensation for temporary disability for period 13.11.60 to 22.12.60 is $84.65.

(d) That the accident to the applicant on 12.11.60 to the right eye arose out of and in the course of her employment with respondent.

(e) That the injured has suffered partial permanent disability in the form of partial loss of vision amounting to 10% loss of unimpaired physical capacity as certified by the Ophthalmologist, Kuala Lumpur, vide medical certificate dated 21.12.60.

The only dispute was as to whether there was any loss of earning capacity. The respondent gave evidence as to the injury and went on to say that she had lost some of her vision in her right eye but admitted under cross-examination that her efficiency as a tapper had not decreased. The evidence of A. F. Flint on behalf of the appellants was to the effect that the applicant was reengaged as a tapper after the accident and that her efficiency as a tapper appeared to be the same and her earnings were the same as prior to the accident. He further stated that tapping does not require full unimpaired perspective vision of both eyes and that the respondent's present employment as a tapper was due to her own capabilities and not through kindness on his part. He also produced a statement of respondent's earnings since 1st January, 1960, and after the accident for comparison. Neither of the parties called any other witnesses. On that evidence at the enquiry the Commissioner made the following comments:

"The Medical Officer has ascertained that there is a 10% loss of physical impairment and as such the applicant should be paid 10% loss of earning capacity amounting to $506.59."

As the parties failed to agree, the respondent had to resort to her next step by making an application to the President, Sessions Court, Klang, as arbitrator under section 30 of the Workmen's Compensation Ordinance.

When the matter came up before the learned President, the respondent as the applicant in those proceedings appeared with an Assistant Commissioner for Labour assisting her. One Mr. Pereira appeared for the appellants, who were the respondents in those proceedings, by special authority which was duly tendered. Mr. Pereira called the manager, Mr. A. F. Flint, to clarify a few points. The evidence of Mr. A. F. Flint at these proceedings was that since the applicant was re-employed she had not been warned in connection with her standard of work, particularly in respect of bark consumption, wounding of trees or inadequate output of latex and that she was then tapping the same area which she tapped before the accident. He further stated that in engaging a tapper he normally put him on trial basis for a month and if his work was satisfactory he was engaged. The workman would not be medically examined and his eyesight would not be tested. If the applicant had turned up as a fresh applicant, her work would be satisfactory enough for her to be employed. Under cross-examination he agreed that the applicant might want to change her employment to one other than that of a tapper. If she wanted to be a weeder, she could do so, but he did not know if her chances of getting a job as a labourer, say, in the P.W.D. or Town Council, would be less because of her impaired eyesight. The applicant produced no further evidence at the hearing before the learned President.

Mr. Pereira in his submissions to the learned President referred to the definition of "partial disablement" contained in section 3 of the Workmen's Compensation Ordinance, 1952, with particular emphasis on the words "such disablement as reduces his earning capacity in every employment which he was able to undertake at the time of the accident", and argued that the medical certificate in this case was no test of loss of earning capacity. As regards loss of earning capacity, his contention was that the burden of proof lay on the applicant. The Assistant Commissioner for Labour argued on behalf of the applicant that if the applicant had lost one eye, she would be paid 30% by way of compensation irrespective of what she earned after the accident. He also referred to the medical certificate presumably in support of his contention that because there was a 10% impairment of vision in the applicant's right eye, her earning capacity was reduced by the same percentage.

On this further evidence and the arguments put before him the learned President made certain findings which in view of their brevity it will be convenient to set out in full. These findings were as follows:—

"It is not disputed that applicant has resumed her previous employment as tapper in respondent's estate and that she has been getting the same rate of wages but that is not conclusive evidence that her earning capacity has not been reduced in every employment which she was able to undertake at the time of the accident. It appears to be the normal practice for estates to so re-employ such injured tappers.

There is no guarantee that applicant would not lose her present employment. The estate, for example, may be fragmentated. If she loses her present employment, applicant's opportunities for obtaining alternative employment as tapper or other manual job and earning the same rates of wages which she was able to earn at the time of the accident would, I find, be narrowed to the extent proportionate to her loss of unimpaired physical capacity as certified by the Ophthalmologist. I therefore find that her earning capacity has been reduced by 10%."

In the result he decided that a lump sum payment of $506.59 based on 10% loss of earning capacity was due to the applicant which the respondents were liable to pay.

The findings and the decision of the learned President are attacked in the present appeal. which has been brought on a certificate under section 39 of the Ordinance, upon the following five grounds:—

" (1) That the learned arbitrator erred in law in not directing himself that the burden of proof that the workman was entitled to compensation for permanent partial disablement lay upon the workman and that as such the learned arbitrator should have directed himself that it lay upon the workman to prove as laid down in section 3 of the Workmen's Compensation Ordinance, 1952, that her earning capacity had been reduced by her disablement in every employment which she was able to undertake at the time of the accident and should have found that the workman had failed to discharge such burden of proof.

(2) That the learned arbitrator erred in law in deciding that the workman's earning capacity had been reduced when in fact the evidence was to the effect that her efficiency as a tapper, i.e., her employment at the time of the accident had not decreased and her earnings after the accident as a tapper were the same as before the accident.

(3) That the learned arbitrator erred in law in finding that the appellant had sustained a loss of earning capacity when the only material evidence was that she had sustained injury. The appellant will contend that mere proof of injury is not proof of loss of earning capacity.

(4) That the learned President further erred in law in finding that the percentage loss of earning capacity was 10%, that is to say, that it was commensurate with the percentage loss of physical impairment in the absence of evidence to that effect.

(5) That the learned arbitrator erred in law in taking into consideration the apparent normal practice for estates to re-employ injured tappers, the absence of a guarantee that the workman might not lose her employment, or the possible fragmentation of the estate where no evidence whatever had been led on these points."

I propose first to deal with grounds (3) and (4) which are inter-related and which in my judgment go to the crux of the matter. The first observation which I wish to make in dealing with these grounds is that partial disablement is defined in section 3 of the Ordinance as follows:—

" 'Partial disablement' means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in his disablement and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was able to undertake at the time of the accident:

Provided that every injury specified in the First Schedule shall be deemed to result in permanent partial disablement."

Bearing that definition in mind, it may safely be said that except in the case of injuries specified in the First Schedule to the Ordinance the compensation given under the Ordinance is primarily based on the diminution of the earning power of the workman by reason of the accident. In the case of continuing incapacity it is equally clear that the payments depend on the diminution of earning power. To ascertain the diminution of earning power, the tribunal has to satisfy itself as to what the workman is earning or able to earn after the accident. Mere proof of injury is not proof of loss of earning capacity. As was stated by Buckley L.J. in the case of *Cardiff Corporation* v. *Hall*[1]:—

" The workman is not entitled to compensation for every injurious result of the accident. He is entitled only to compensation for personal injury resulting in incapacity for work, and that compensation is to be ascertained as directed, including an ascertainment of the amount which he is earning or able to earn after the accident."

Lord Green M.R. stated the law on this point in the case of *Allen* v. *Tinsley Park Collieries Ltd.*[2] as follows:—

" Incapacity for work is not to be ascertained simply by finding that the workman is suffering from a continuing physical injury; it is to be ascertained by reference to his incapacity to earn wages. If his wage-earning capacity is diminished he is suffering from a partial incapacity for work: if, on the other hand, his wage-earning capacity has not been affected in the least, then notwithstanding the fact that he may be suffering from the consequences of a physical injury, he is not incapacitated for work and he is not entitled to compensation."

From the reasons given by the learned President it seems to me that he has based his findings on the reasoning that because the applicant suffered an impairment of 10% in the vision of her right eye as a result of the accident she must be deemed to have suffered a diminution in her earning capacity by the same percentage. If that was his reasoning he was clearly wrong because of what I have stated above as regards the legal position as to the payment of compensation for a partial disablement of a permanent nature. It is not possible to say to what extent the learned President was influenced by the argument that if the applicant had lost one eye, she would have been paid 30% compensation. The only observation which I need make in relation to this is that any injury to the eye other than an injury which results in the "loss of sight" is outside the scope of the First Schedule to the Ordinance, so that any such partial loss of sight cannot be related to the compensation on 30% payable under the First Schedule for "loss of sight of one eye". "Loss of sight" must necessarily mean total loss of sight resulting in the blindness of the eye for which a compensation of 30% is payable under the First Schedule irrespective of whether or not it results in any reduction in the workman's earning capacity. Hence in respect of any injury lesser than an injury resulting in blindness it would be necessary to establish by evidence that it resulted in reduction of the workman's earning capacity in every employment which he was able to undertake at the time of the accident.

That brings me to grounds (1), (2) and (5) of this appeal on the question of burden of proof. Now, the general rule as laid down in section 101 of the Evidence Ordinance is that whoever desires any court to give judgment as to any legal right or liability, depending on the existence of facts which he asserts, must prove

that those facts exist. Again, to quote Buckley L.J. in the case of *Hawkins* v. *Powells Tillary Steam Coal Co. Ltd.*[3] on Workmen's Compensation:

"When it is said that a person who comes to the Court for relief must prove his case, it is never meant that he must prove it with absolute certainty. No fact can be proved in this world with absolute certainty. All that can be done is to adduce such evidence as that the mind of the tribunal is satisfied that the fact is so. This may be done either by direct evidence or by inference from facts. But the matter must not be left to rest in surmise, conjecture, or guess."

In the present case there was no evidence to show that the respondent's earning capacity had decreased in any way as a result of the accident. On the contrary, there was evidence that when she resumed work after the accident, she was earning the same wages as before the accident. There was also evidence that she was paid the same wages because she was able to do the same work and that the wages were not paid to her out of any consideration of charity. She adduced no evidence to show that her earning capacity in every employment which she was able to undertake at the time of the accident had been reduced in any way. It seems to me, therefore, that she had not discharged the burden of proof which rested upon her, and that the learned President was not entitled to indulge in surmise, or speculation, or conjecture, or guess, which in fact, as it seems to me, he did. The learned President was also wrong in taking into consideration the normal practice for an estate to re-employ injured tappers, the absence of a guarantee that the workman might not lose his employment or the possible fragmentation of the estate when there was no evidence whatsoever on these points.

For the reasons which I have stated I have come to the conclusion that this appeal must be allowed and that the order of the learned President be set aside. There will be an order accordingly. In all the circumstances of the case and in view of what the learned counsel for the appellant has stated, there will be no order as to costs.

Appeal allowed.

Solicitors: *Shearn Delamore & Co.*

YOHANNAN v. REGINA

[A. Cr. J. (Chua J.) December 21, 1962]

[Singapore — Magistrate's Appeal No. 132 of 1962]

Criminal Procedure — Statement made by witness to police officer in the course of police investigation — Request by accused to refer to statement — Refusal by Magistrate to order production or refer to statement — Whether prejudicial to appellant — Criminal Procedure Code (Cap. 132), ss.120 and 121(2).

The court is obliged, under section 121(2) of the Criminal Procedure Code, on the request of the accused, to refer to the statement of the witness to the police and the court has a discretion, if it thinks it expedient in the interest of justice, to direct that the accused be furnished with a copy of it to enable the accused to impeach the credit of the witness in manner provided by the Evidence Ordinance.

In this case the appellant requested the Magistrate to refer to a statement made by the complainant to a police inspector under the provisions of section 121(2) of the Code. The prosecution objected to the production of the statement on the ground that it was inadmissible and the Magistrate upheld this objection.

Held: the Magistrate was wrong in refusing to order the production of the statement and referring to it. That omission had prejudiced the accused and it could not be said that he had a fair trial. There had been a failure of justice and the conviction could not be sustained.

MAGISTRATE'S CRIMINAL APPEAL.

T. T. Rajah for the appellant.

Sachi Saurajen (Deputy Public Prosecutor) for the respondent.

Chua J.: This is an appeal from a conviction under section 147 of the Penal Code, and a sentence of 4 months imprisonment.

The charge against the appellant was that he on or about the 3rd January, 1962, at about 4.45 p.m. at Dairy Farm Road, Singapore, was a member of an unlawful assembly and in prosecution of the common object of such assembly viz. to cause bodily harm to one Lee Tat Hin, committed an offence of rioting and thereby committed an offence punishable under section 147 of the Penal Code. At the close of the case for the prosecution, counsel for the appellant submitted that no case had been made out against the appellant which, if unrebutted, would warrant his conviction. The Magistrate, however, after hearing the prosecution in reply, called on the appellant to enter upon his defence. The appellant on the advice of his counsel elected to remain silent and thereupon the appellant was convicted and sentenced to 4 months imprisonment.

Briefly the prosecution's case was that on the 3rd January, 1962, at about 4.45 p.m., Lee Tat Hin, an accountant of Gammon (Malaya) Ltd., was leaving the premises of the Company in the Company's car, driven by one Mohamed, together with two colleagues Whitley and Atkinson. The car slowed down at a bend in the road and an Indian sprang at the car from behind roadside stall. The Indian held some stones in his hand and he made a threatening gesture to toss the stones at the occupants of the car. The car stopped. Then a group of Indians converged on the car. Lee Tat Hin said that he saw not less than 10 persons and that he could recognise the appellant whom he knew as "John" as being one of them. The appellant was shouting something to the men who had already surrounded the car. Then the appellant went up to the door of the car nearest to Lee Tat Hin and opened it. With the assistance of some Indians the appellant tried to drag out Lee Tat Hin; when the appellant failed to drag out Lee Tat Hin he punched Lee Tat Hin a few times and then urged the others to do so. The others